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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 384.

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912,

Petitioner,

against

BERRYMAN HENWOOD, Trustee of St. Louis Southwestern Railway Company, Debtor, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and SOUTHERN PACIFIC COMPANY,

Respondents.

JOINT BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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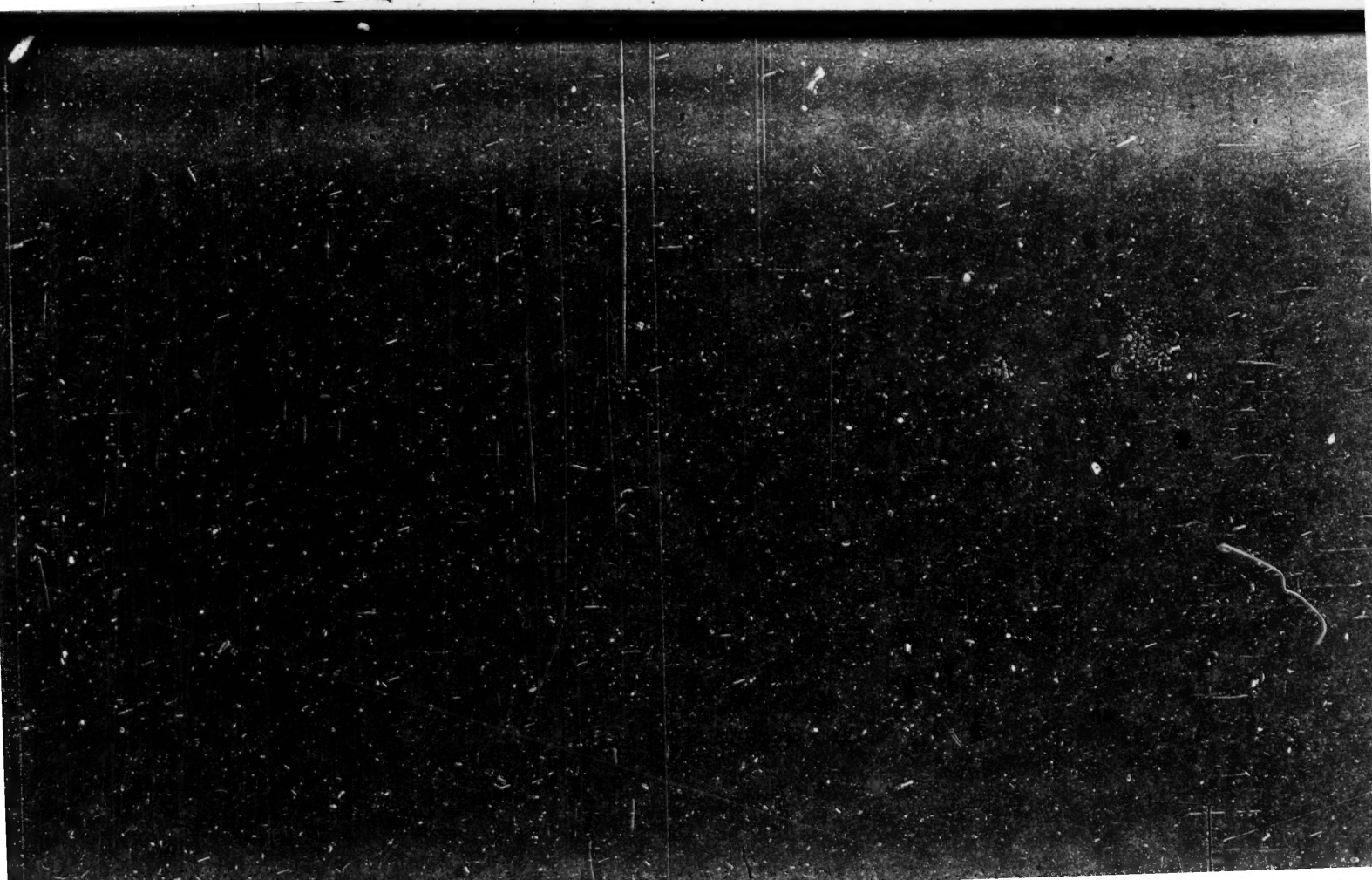

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STATUTES AND OTHER AUTHORITIES

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Opinions Below.

The United States District Court for the Eastern District of Missouri, Eastern Division, wrote no opinion, but it made findings of fact and conclusions of law (R. 127-143). The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 246-254) is reported in 98 Fed. (2d) 160, the Advance Sheets for September 12, 1938.

Statement of Case.

The grounds upon which the case was decided below cannot be understood from Petitioner's Summary Statement.

The Respondent, St. Louis Southwestern Railway Company, is a Missouri corporation. As of January 1, 1912, this Company executed its First Terminal and Unifying Mortgage, conveying railroad properties to secure an issue of bonds known as its First Terminal and Unifying Mortgage Bonds. Bonds in the total amount of $21,638,000 were authenticated by Guaranty Trust Company of New York, as trustee under the mortgage, and are now held by various persons.

Eight million one hundred fifty-five thousand dollars of the bonds (including those involved here) were issued and sold in New York in 1912 to a group of American purchasers, and payment was received in money of the United States (R. 132, 160) in the sum of $835 for each bond (R. 132). The proceeds were to be used for specified purposes in this country (R. 160-163, 133). The Debtor's First Terminal and Unifying Bonds were issued to evidence the Debtor's liability for the repayment of sums of United States money borrowed; they were not issued upon a sale or purchase of guilders or other foreign money; the provisions contained in said bonds for optional payment in guilders or other foreign moneys were an assurance, in addition to the "gold clause" contained in the bonds, to the holders thereof against a depreciation in the value of the United States dollar; the amount of guilders mentioned in the bonds was at the time of the issuance of said bonds the equivalent of $1,000 United States gold coin of the standard of weight and fineness as it existed on January 1, 1912, and it was understood, and specified in the indenture under which said bonds were issued, that the amounts of guilders, pounds, francs or marks mentioned in said bonds were each the equivalent of United States

old coin in said amount and of such standard of weight nd fineness (R. 134, 160-163, 165-168).

The coupon bonds issued under the First Terminal and Unifying Mortgage contain a foreign money option clause providing that payment will be made in New York in specified amounts of dollars, or at the option of the holders f the bonds and coupons, in London, Amsterdam, Berlin r Paris, in specified amounts of pounds, guilders, marks r francs, respectively. The provisions of the bonds are orrectly quoted by Petitioner (Petition, p. 3). These rovisions were inserted pursuant to provisions of the indenture reading as follows:

> "* * * said bonds, both as to principal and interest, to be payable at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed January 1, 1912 (the coupon bonds also to be payable, both as to principal and interest, at such places in the following cities in foreign countries as the Board of Directors may from time to time designate, viz.: London, England, or Amsterdam, Holland, or Berlin, Germany, or Paris, France), * * *". (R. 130, 18),

nd (Article First, Section 4, thereof):

> "All or any of the coupon bonds issued hereunder from time to time shall be payable at the office or agency of the Railway Company in the Borough of Manhattan in the City and State of New York, or, at the option of the holders of said coupon bonds, in the cities and countries, respectively, and in the respective currencies stated in the form of coupon bond hereinbefore set forth, but *the face amount of each of such coupon bonds shall be $1,000 in United States gold coin* of the standard of weight and fineness existing on January 1, 1912, *or the equivalent thereof,* calculated at the rates of exchange stated in the form of coupon bond hereinbefore set forth. The principal amount of First Terminal and Unifying Bonds which the Rail-

way Company shall be entitled to issue under the provisions of this indenture shall be ascertained at the like rate or rates of exchange, and, for all purposes of this indenture and of said bonds, the indebtedness represented by said bonds in United States gold coin, as aforesaid, shall be calculated at the like rate or rates of exchange" (R. 130, 38, 39). (Emphasis is ours.)

Because of monetary conditions in the several countries involved, there would have been no substantial advantage to the mortgage trustee or bondholders to claim payment in pounds, marks or francs, but a claim for 2,490 guilders on each $1,000 bond, if sustained, as of one of the dates mentioned by Petitioner, would result in a premium of about 69 per cent on the face amount of the bonds and coupons, over and above the principal dollar amount thereof (R. 140, 164). The claim on each $1,000 bond would increase to $1,687,722, with interest, and the aggregate indebtedness (if the guilder claims should be sustained for the entire issue) would increase from $21,638,000 to $37,335,525.12. Upon the bonds represented by the Petitioner concerned in this petition, the indebtedness would be increased from $5,636,000 to $9,512,001.19. This situation resulted from a decrease in the gold content of the United States dollar, while the gold content of the guilder remained unchanged.

The guilder is the monetary unit of Holland (R. 137, 165). When the bonds were issued the guilder was worth $.4020 (R. 140, 168), and $1,000 would buy 2,490 guilders, the exact number specified in each of the coupon bonds. At the date of the execution of stipulation of facts (November 8, 1937) the exchange value of the guilder was $.5560 (R. 140, 165). However, the exchange value of the guilder in terms of the dollar was considerably higher on several dates between 1933 and the date of execution of the stipulation. In this connection certain other dates may become important, and the parties have stipulated that on each of the dates in question the exchange value was

6778 (R. 140, 164), viz.: on December 12, 1935, the date n which the Debtor's reorganization petition was filed; n May 5, 1936, the date as of which the Guaranty Trust ompany of New York declared all of the bonds immediately due and payable; and on September 24, 1936, the ate on which the Guaranty Trust Company of New York xecuted its proof of claim (R. 140, 164, 165).

The mortgage provides that certain of the bonds are ayable at the offices of the Debtor in the several foreign ountries named. The Debtor, however, has never maintained an office or agency in Amsterdam, Holland, for the ayment of interest or principal on these bonds, or at any f the other foreign cities named (R. 132, 159). As a natter of fact, there was no demand for payment in uilders prior to June 5, 1933, the date of the Joint Resolution of Congress, 48 Stat. 112, 31 U. S. C. A., Section 63 (R. 134, 198). Believing that the Joint Resolution anned payments in foreign moneys, the Debtor did not rovide for the payment of the bonds or coupons in any urrency other than that of the United States, and it had o foreign paying agent at any time (R. 132, 180). In his case we are dealing exclusively with the rights of merican holders (R. 135).

The Petitioner, as trustee of the First Terminal and nifying Mortgage, sought to exercise election to receive uilders. It states on page 5 of its petition that there as implied power on its part to exercise this election on behalf of bondholders upon whom that power had been nferred and who took no action for themselves. This ises the question of law stated, *infra*, page 7.

The District Court and the Circuit Court of Appeals ld that the Petitioner's claim should not be allowed in amount greater than the face amount of the bonds and purtenant coupons as expressed in United States money.

Questions presented as viewed by respondents.

Under the heading of Questions Presented, the Petitioner (p. 2, its Petition) undertakes to state the questions concerning the interpretation and application of the Joint Resolution of Congress of June 5, 1933 (48 Stat. 112; U. S. C. A., Title 31, Section 463), which were discussed and decided by the Courts below. In its statement of these questions, the Petitioner has assumed the facts to coincide with its view of the case, ignoring the findings of fact made by the District Court below and concurred in by the Circuit Court of Appeals. These findings dealt with matters which are of importance in reaching the correct determination of the case. Some of the facts so found were that the bond obligations of the St. Louis Southwestern Railway Company represented contracts between American citizens for the loan of United States money and the repayment of the value thereof, a money contract, and not a commodity contract (R. 134, 254); that the provisions in regard to optional payment in foreign moneys were inserted as an additional safeguard against monetary devaluation, supplementing the gold clause (R. 134); and that the amounts of foreign moneys mentioned in the foreign money options were fixed as the equivalent in value of United States gold coin of the standard of weight and fineness as it existed January 1, 1912 (R. 134, 252). The case was presented in the District Court upon a stipulation of evidentiary facts, supplemented by oral testimony. The findings of the Courts below upon the correct inferences to be drawn from the stipulated facts and testimony are not to be ignored. *United States* v. *Commercial Credit Co.*, 286 U. S. 63, 67. A statement less simple but more accurate than the Petitioner's of the question of law decided by the Court below is the following:

> Does the Joint Resolution of Congress of June 5, 1933, directing that every obligation payable in money of the United States, heretofore or hereafter incurred,

shall be discharged upon payment, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender for public and private debts, direct the manner of discharge of bonds sold in 1912, payable in 1952, by an American corporation to American purchasers in consideration of American money loaned in a transaction in no way related to the money of any foreign country, where the bond contract when read with the mortgage indenture was to pay $1,000 in United States gold coin of the standard of weight and fineness as it existed January 1, 1912, or the equivalent thereof in specified amounts of foreign moneys at the holder's option?

Petitioner's question No. 1 relates to an agreement payable solely in guilders in Holland, and we have no difficulty in joining with the Petitioner in answering it "No". Petitioner's questions Nos. 2 and 3 ignore that the Courts below found the promise to pay United States money to be primary (R. 141, 252), ignore all of the other factors mentioned above, and ignore that the option to receive guilders had not been exercised on June 5, 1933, so that upon the date of the passage of the Joint Resolution the bond represented a contract obligation payable in money of the United States and within the reach of the Joint Resolution.

Additional questions will be presented in this case if this Court should not concur in the conclusion of the Courts below that the Joint Resolution is applicable to the bonds concerned. We shall not enumerate all of the questions which are raised in the protests and supplemental protests of the Respondents (R. 106-123). One of the most serious questions arises from the fact that the Petitioner seeks to support the allowance of its proof of claim for the value of guilders upon a purported election to receive guilders made by it as mortgage trustee, and not by the bondholders. For the Petitioner's claim to be allowed in the amount claimed by it, the following question would have to be answered in the affirmative:

Where by the terms of the bonds, coupons and indenture of mortgage, the option to receive guilders

instead of dollars was specifically reserved to the holders of the bonds and was not conferred upon the mortgage trustee, may the mortgage trustee elect to take guilders in behalf of bondholders who have refrained from making such an election upon their own account and who have not authorized the mortgage trustee to make such an election for them?

From the first the Respondents have contended that this question must be answered in the negative, and that the application of the Joint Resolution of June 5, 1933, is not really and truly involved in this case.

If all of the other questions in this case should be decided in favor of the Petitioner, an important question remains as to the measure of damages. The Respondents have contended throughout that as the place for the payment of guilders is abroad, the claim therefor should be translated into dollars upon the basis of the exchange value of the guilder in terms of the United States dollar upon the judgment date, *i. e.*, the date of the allowance of the claim. *Deutsche Bank* v. *Humphrey*, 272 U. S. 517; *Zimmermann* v. *Sutherland*, 274 U. S. 253; *Restatement, Conflict of Laws*, 1934, Section 424. The Petitioner has contended that these decisions are inapplicable to an insolvency proceeding, and has argued that the date of the filing of the petition under amendatory Section 77 of the Bankruptcy Act is determinative. On the other hand, other dates may be of possible significance, *i. e.*, the date of the acceleration of maturity of the bonds, the date of demand for payment in guilders, or, inasmuch as the real issue is as to the securities to be received upon reorganization, perhaps the date of the consummation of the reorganization plan should be controlling. The importance which this subordinate question might assume is apparent from the variations in the dollar value of the guilder stated on pages 4 and 5, *supra*.

We mention these various questions since if certiorari should be granted without limitation, as requested by Petitioner, all of these points will have to be briefed and presented to the Court.

ARGUMENT

I.

There is no conflict between the decision below and he previous decision of the United States Circuit Court f Appeals for the Second Circuit in *Anglo-Continentale reuhand, A. G.* v. *St. Louis Southwestern Railway ompany*, 81 Fed. (2d) 11, certiorari denied, 298 U. S. 55, which has not been resolved by the intervening de- sion of this Court in *Holyoke Power Co.* v. *Paper Co.*, 00 U. S. 324, and there is no conflict between the de- sion below and any other Circuit Court of Appeals' ecision.

The conclusions of law of the District Court (R. 143) nd the opinion of the Circuit Court of Appeals for the ighth Circuit (R. 249) expressed disagreement with the nclusion reached by the Circuit Court of Appeals for the econd Circuit in *Anglo-Continentale Treuhand, A. G.* v. *t. Louis Southwestern Railway Company*, decided Janu- y 13, 1936, *supra*, and these Courts were of the opinion at the premises upon which the Second Circuit pro- eded were inconsistent with the intervening decision of is Court in *Holyoke Power Co.* v. *Paper Co.*, decided arch 1, 1937, *supra*. We believe that the Courts below re correct in their analysis and that the points of con- t between the Second Circuit Court of Appeals and the ghth Circuit Court of Appeals have already been de- rmined by this Court consistently with the decision of e Eighth Circuit. If so, there is no occasion for the uance of a writ of certiorari in respect to a conflict ich has already been resolved. We do not claim that e Supreme Court has decided the exact question or ques- ns presented in this case, but we do affirm that the Su- me Court has rejected the interpretation of the Joint solution adopted by the Second Circuit Court of Ap-

peals and has established guides to the interpretation of the Joint Resolution which were correctly applied in the opinion below.

In *Anglo-Continentale Treuhand, A. G.* v. *St. Louis-Southwestern Railway Company, supra,* the plaintiff, a corporation of the Principality of Liechtenstein, in Europe, sued upon certain interest coupons maturing January 1st and July 1st, 1934, and January 1st, 1935, appurtenant to the bonds (here involved) of the St. Louis Southwestern Railway Company, containing foreign money options, and sought to recover the value of the Dutch guilders which it had elected to receive. Upon the pleadings and affidavits, summary judgment for the plaintiff was directed in accordance with the New York practice, for the value of the guilders elected, and this was affirmed by the Second Circuit Court of Appeals. It has been suggested that the case rested upon the foreign ownership of the bonds and coupons, but the opinion makes clear that the Court did not regard the nationality of the owner of the bonds or coupons as important. A careful study reveals that the Court based its conclusion that the Joint Resolution did not apply upon two principal premises.[1] The first premise was that the effect of the Joint Resolution was limited to a proscribing of the provisions mentioned in the first sentence of the enacting clause thereof. This is implicit from the following statement of the Court in the second paragraph of the opinion:

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[1]Unfortunately for the clarity of the opinion, the Court, by some inadvertence, misstated the question for decision in the third sentence from the end of the first paragraph of the opinion. It stated: "The only question is whether the damages recoverable in dollars in this action are to be calculated at the gold par of the guilder, or at the rate of exchange prevailing in New York at the time of judgment." In fact there was only a slight variance between the gold par of exchange in the years 1934 to 1936, *i. e.*, $.68056 (R. 168), and the exchange value of the guilder then current. Any substantial variation would have been corrected by the shipment of gold. This inadvertence led to the absurd summary of the decision in the syllabus to the effect that the Court held that damages should be recoverable calculated at the gold par of the guilder and not at the prevailing rate of exchange in New York. Of course, it is elementary that the value of foreign moneys is determined at the exchange rate at the date which is deemed important by the Court, and never at its nominal par. 48 C. J. 606; *Sutherland* v. *Mayer,* 271 U. S. 272, 295.

"still it is a plausible, though to us not a persuasive, argument that 'obligation' means the instrument itself and that the resolution therefore covers all instruments which contain a promise to pay money of the United States. That would put these bonds within the resolution as to the promise to pay dollars in gold, as of course they are, but it does not advance the defendant's case a whit as to the other promises. They are within the resolution only in case its terms cover them, which they do not. It only proscribes a 'provision' which 'purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured by either. Since, as we have seen, the promise to pay guilders did not 'purport * * * to require payment in gold,' the resolution does not hit it."

fh this language the Court concluded its statement of reasons why the language of the Joint Resolution did hit the coupons in question. The opinion can be rched and no reference can be found to the second tence of the enacting clause of the Joint Resolution. e Court failed to perceive that if it had yielded to what termed the plausible but not persuasive argument that bligation" included the coupon as such, such coupon be- ae dischargeable, dollar for dollar, in United States legal der by reason of the express command of the second tence of the Joint Resolution.

The second premise of the opinion was that the applica- n of the Joint Resolution should be determined by con- eration solely of the written face of the contract, and t the Court should not consider the circumstances sur- nding the making of the contract to determine whether vas in fact a money contract, as, for instance, an agree- nt from an American debtor to an American creditor epay American money loaned for use in America, or a modity or foreign money contract, as, for instance, an eement given to a foreign creditor to evidence a trans- on in or concerning guilders. This premise the Court

emphasized in the next to the last paragraph of its opinion, as follows:

> "If the resolution did not reach bonds held by aliens when passed, it did not reach those then held by citizens; we cannot give the same words one meaning for one set of obligees and another for another. Congress either forbad the enforcement of such promises, or it did not. We will not try to recast it altogether, excepting alien obligees though its language covers them equally with citizens."

When this Court came to consider the interpretation of the Joint Resolution as applied to an alternative contract of a somewhat different type, its opinion, rendered through Mr. Justice CARDOZO on March 1, 1937, in *Holyoke Power Co.* v. *Paper Co., supra,* illuminated the Joint Resolution and gave proper point to its language. It swept away previous misconceptions, including the premises advanced by the Circuit Court of Appeals for the Second Circuit in support of its decision in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company.* The *Holyoke Power Co.* case dealt with a lease which provided that the grantee should yield and pay to the grantor as rent "a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency." The lessee contended that it could discharge the rental by the payment in United States lawful tender of the number of dollars mentioned. This Court held for the lessee on the ground that the contract was "within the letter of the Joint Resolution of June 5, 1933, and equally within its spirit."

The Supreme Court did not ignore the second sentence of the Joint Resolution, as did the Second Circuit, but to the contrary found that the obligation being considered by it was one to be discharged under the command of the second sentence, dollar for dollar, in legal tender. It said in *Holyoke Power Co.* v. *Paper Co., supra,* page 335:

"The obligation was one for the payment of money, and not for the delivery of gold as upon the sale of a commodity."

and again, on page 339:

"Accordingly, all such provisions (those mentioned in the first sentence of the Joint Resolution) are declared to be against public policy, and every obligation, heretofore or hereafter incurred, though it contain such provisions, shall be payable, dollar for dollar, in legal tender at the time of payment."

and on page 340:

"'Dollar for dollar', the obligation for the payment of money conforming to the standard of the covenant is to be discharged with money of the standard established by the law."

After the decision in the *Holyoke* case, we submit that the *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company* decision by the Circuit Court of Appeals for the Second Circuit is no longer authoritative for the proposition that the Joint Resolution does no more than proscribe the specific provisions enumerated in the first sentence thereof.

It is equally clear that the second premise of the Second Circuit Court of Appeals' decision that the application of the Joint Resolution may not vary with the circumstances surrounding the execution of a contract was expressly repudiated by this Court in the *Holyoke* case, where, in considering the contract there concerned, it observed, on page 335 of its opinion, that the lessor was a water power company engaged in that business and not in any other, and that there was no pretense that it was stipulating for gold to be used in art or industry, but that which it wished was currency, or bullion susceptible of being converted into currency, and said:

"We must consider the situation of the parties, their business needs and expectations, in gauging their intention."

After this emphasis by this Court upon the duty to consider all surrounding circumstances in determining whether a contract is the kind of obligation which comes within the provisions of the Joint Resolution, it would be idle for anyone to refer to the *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company* case to support the proposition that varying circumstances may never determine whether an obligation is a money contract within the terms of the Joint Resolution or solely a commodity contract outside of its reach.

The Circuit Court of Appeals for the Eighth Circuit in its decision rendered July 13, 1938, perceived the irreconcilability of the views expressed by the Circuit Court of Appeals for the Second Circuit in the *Anglo-Continentale Treuhand* case with the guides given by the Supreme Court in the *Holyoke* case (R. 249).[1] It then proceeded to a determination of whether under the circumstances in the record before it the First Terminal and Unifying Bonds of the St. Louis Southwestern Railway Company were obligations payable in money of the United States, money contracts, dischargeable, dollar for dollar, in United States legal tender, or commodity contracts outside of the reach of the Joint Resolution. In determining this question it conducted an inquiry which had not been conducted by the Second Circuit Court of Appeals because that Circuit Court of Appeals had thought, upon grounds now untenable, that an inquiry of such a nature was pointless.

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[1] It said: "Both the Anglo-Continentale Treuhand and the McAdoo opinions reveal the same reasoning in reaching a decision. That reasoning is that the language of the resolution is clear and unambiguous and means obligations which *must* be paid in United States gold dollars or the equivalent thereof in other United States money." That is indeed the effect of those decisions which find in the Joint Resolution only a proscription of any individual promise requiring payment of gold or a particular kind of coin or currency or an amount in money of the United States measured thereby. Thus, to come within the reach of the Joint Resolution as so limited, there must be a promise which combines an agreement to pay in gold and an agreement to pay in United States money, which is, we take it, the peculiar feature of the conventional agreement to pay in United States gold coin. With the disappearance of United States gold coin from circulation it is not likely that the gold coin contract will again become popular. The Joint Resolution, if so interpreted, would have a very limited application in the future.

If our analyses of the decisions are correct, there is no nflict remaining to be resolved between the Circuit Court Appeals for the Second Circuit and the Circuit Court Appeals for the Eighth Circuit calling for the granting certiorari. When we have the considered views of this urt upon the interpretation of the Joint Resolution, it ems fruitless to us to speculate upon why this Court nied certiorari in *Anglo-Continentale Treuhand, A. G. St. Louis Southwestern Railway Company.*

Some reference is made in the petition, page 9 thereof, alleged conflict between the decision below and the de- ion in *McAdoo* v. *Southern Pacific Company* (Dist. Ct., D., Cal., S. D.), 10 Fed. Supp. 953. That decision, ren- ed June 17, 1935, was reversed on jurisdictional grounds the Circuit Court of Appeals for the Ninth Circuit in Fed. (2d) 121, and the suit was later dismissed by the intiff. There is, therefore, no conflict between the ghth Circuit Court of Appeals and the Ninth Circuit urt of Appeals.

The opinion of the Eighth Circuit Court of Appeals in mery Bird Thayer Dry Goods Co. v. *Williams,* 98 Fed. d) 166, rendered July 13, 1938, on the same day the de- ion below was handed down, was not regarded by the ges joining in the majority opinion therein as conflict- . A petition for rehearing has been granted, the de- e has been set aside, and the case set for reargument October 31, 1938 (see footnote 1, p. 10, Petitioner's ition). Since there has been no final decision in the ery Bird Thayer case by the Eighth Circuit Court of peals, it cannot be said that there is any existing con- within the Circuit. To charge the existence of a con- with the *Emery Bird Thayer* case, when the Circuit rt of Appeals has not finished its consideration there- is premature. Even if the Eighth Circuit Court of peals should reaffirm the conclusions expressed in its opinion in that case, in our judgment there is no ssary conflict between that case and the decision in

the case at bar. Unquestionably, in the *Emery Bird Thayer* case the option to receive United States money was secondary to a primary promise to deliver gold as a commodity, whereas in the instant case the promise to pay United States gold coin was either primary, as found by the Courts below, or of equal rank with the other promises in the bonds, as contended for by Petitioner. If the Circuit Court of Appeals should reaffirm its conclusions in the *Emery Bird Thayer* case, there may well be a probable conflict between that decision and the decision of this Court in *Holyoke Power Co.* v. *Paper Co.*, but this would constitute a ground for granting certiorari in that case and not a reason for granting certiorari in this case.

II.

It is true that the Circuit Court of Appeals for the Eighth Circuit has decided a question concerning the application of a Federal statute, but we cannot agree that the question is of great public importance, outside of the substantial amounts involved in the case at hand, and certainly the decision is not in probable conflict with the applicable decisions of this Court.

This Court has dealt with the constitutionality and interpretation of the Joint Resolution in the three gold clause cases, *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240; *Nortz* v. *United States*, 294 U. S. 317; *Perry* v. *United States*, 294 U. S. 330, in *Holyoke Power Co.* v. *Paper Co.*, 300 U. S. 324, and in *Smyth* v. *United States*, 302 U. S. 329. The opinions reflect the full consideration given these cases and we suggest that the discussion of the Joint Resolution contained in these opinions is sufficient to afford suitable guides for the interpretation and application of the Joint Resolution by the lower Federal Courts. Certainly the Courts below in this case were directed in their solution of the problem by the decisions of this Court.

The importance of the precise question at issue, viz., the plication of the Joint Resolution to United States money ntracts containing foreign money options, has become of newhat lesser importance in the last few years. A num- r of bond issues having such options have been redeemed cently, and there are only two uncalled issues, in addi- n to the St. Louis Southwestern Railway Company ue, which are payable in money of the United States, or tionally in a foreign money now at a premium, viz., an ue of Southern Pacific Company and an issue assumed Niagara, Lockport and Ontario Power Co. Also some nds of this character of the Bethlehem Steel Company, ich have been called for payment, are still outstanding. oreover, the foreign moneys in which these issues are tionally payable, Dutch guilders and Swiss francs, now mmand a smaller premium than they did several years o.

That the Petitioner itself does not believe that the ques- n presented in this case is of importance because of the evalence of litigation involving the same issue is indi- ed by the language used by the Petitioner in its brief opposition to Trustee Henwood's petition for a writ of rtiorari in the case of *Guaranty Trust Company of New rk* v. *Henwood*, 86 Fed. (2d) 347, certiorari denied, 300 S. 661, a case between the Petitioner and Respondent nwood involving the acceleration of maturity of these ne bonds, where the Petitioner (respondent there) said page 17 of its brief:

> "In his (Henwood's) petition to this Court, dated March 2, 1936, in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company, supra,* requesting a writ of certiorari with respect to these same multiple-currency bonds, this petitioner stated that approximately $90,000,000 face amount of bonds issued by American obligors
>
> 'have alternative provisions for payment in moneys of countries remaining on the pre-war gold standard. Bonds falling in the last-mentioned category

> have been issued by such representative companies as Bethlehem Steel Company, Lackawanna Steel Company, Southern Pacific Company, Pacific Gas & Electric Company, as well as St. Louis Southwestern Railway Company' (p. 6).
>
> Of the companies enumerated by the petitioner (Henwood) as having issued bonds containing a provision similar to the instant one, St. Louis Southwestern Railway Company, the Debtor here, is the only railroad corporation—so that, by the petitioner's (Henwood's) own showing, no other proceedings under Section 77 would ever be likely to present the question involved here. The decision in this case affects only the interests of the parties to this cause."

Moreover, on page 29 of Petitioner's brief in this case it minimizes the importance of the rule applicable to contracts containing multiple-currency clauses.

If the decision had been to the contrary in the Court below, it is true that a very substantial burden would have been placed upon the debtor companies still having such issues outstanding. There has been little interest, however, among the holders of these bonds to secure payment at more than the dollar face of the bonds or coupons. On pages 11 and 12 of the Petitioner's petition it has undertaken to list the cases which have dealt with the application of the Joint Resolution to such bond contracts. With one exception, every reported case is concerned with a suit brought by a trust company, acting because of the compulsion of its fiduciary position, or by a European corporation which had recently acquired bonds or coupons, presumably for the purpose of speculation. The one exception is the case of *McAdoo* v. *Southern Pacific Company, supra,* and there the individual bondholder owned one bond of the face value of $1,000! Bonds of this kind are held by insurance companies, savings banks, and other responsible institutions, but by and large these holders perceived and acted upon the considerations which prompted the observation of the New York Appellate Division, First

partment, *City Bank Farmers Trust Co.* v. *Bethlehem el Co.*, 244 App. Div. 634, 280 N. Y. Supp. 494, 497, that:

"Equity and justice demand that all who live under and enjoy the benefits of our government and its laws should be placed upon an equal footing, at least in so far as our currency is concerned. Mindful of its underlying purposes, good citizenship requires that the resolution should be accepted in a spirit which will not permit an unfair advantage to the creditor at the expense of the debtor."

We are not beside the mark when we say that practically sole interest in securing a review of the decision be- is on the part of fiduciaries wishing to be sure that y have discharged the duties of their trusts, and inter- ional speculators seeking an opportunity to make a fit.

Petitioner is wrong when it says in its petition, page that the decisions in New York State on this question in hopeless confusion. To the contrary, every unre- sed decision in New York holds that the Joint Resolu- n applies to bonds payable in money of the United tes or optionally in foreign moneys. These decisions, interpreting and applying the Joint Resolution, are:

City Bank Farmers Trust Co. v. *Bethlehem Steel Co.*, 244 App. Div. 634, 280 N. Y. Supp. 494 (Appellate Division, First Department);

Anglo-Continentale Treuhand, A. G. v. *Southern Pacific Company*, 251 App. Div. 803, 298 N. Y. Supp. 181 (Appellate Division, First Department), affirming 165 Misc. 562, 299 N. Y. Supp. 859;

Zurich General Accident & Liability Ins. Co., Lim. v. *Bethlehem Steel Co.*, 254 App. Div. 839, 6 N. Y. Supp. (2d) 139 (Appellate Division, First Department), affirming s. c. *sub. nom. Zurich General Accident & Liability Ins. Co., Lim.* v. *Lackawanna Steel Co.*, 16[illegible] Misc. 498, 299 N. Y. Supp. 862 (Appeals are pending in the New York

Court of Appeals in this case and in the one next cited);

Anglo-Continentale Treuhand, A. G., et al. v. *Bethlehem Steel Co.*, 254 App. Div. 844, 6 N. Y. Supp. (2d) 334, (Appellate Division, First Department) modifying decision below (98 N. Y. L. J. 1164, October 15, 1937);

Hydropress Handels, A. G., et al. v. *Lackawanna Steel Co.*, 99 N. Y. L. J. 106, page 2221, May 7, 1938 (New York Supreme Court).

As indicated, all of these decisions sustained the application of the Joint Resolution to a bond of this character. After the leading decision in *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.*, the discussions in the opinions are largely confined to whether an exception should be made in favor of a foreign holder. There have been some dissents, but the majority of the Appellate Division, First Department, has in each instance sustained the application of the Joint Resolution. One of the finest opinions upon this subject is the one written by Mr. Justice Rosenman of the New York Supreme Court in *Zurich General Accident & Liability Ins. Co., Lim.* v. *Lackawanna Steel Co.*, reported 164 Misc. 498, 299 N. Y. Supp. 862.

III.

The decision of the Circuit Court of Appeals below did not depart from the accepted and usual course of judicial proceedings in bankruptcy.

Surely the Petitioner is not sincere in the assertion made by it on page 14 of its petition that the decision of the Court below departed so far from the accepted and usual course of judicial proceedings in bankruptcy as to call for an exercise of this Court's power of supervision. The Court below determined the legal question upon the record, affirming the decision of the District Court, in accordance with the weight of judicial decision.

IV.

The case was decided correctly by the Court below.

The opinion of the Eighth Circuit Court of Appeals, written by Judge STONE, is well reasoned and clearly expressed. It requires no defense from counsel, but we shall comment upon some erroneous assertions and misconstructions made by Petitioner.

On pages 20 and 21 of its brief, under Point I of its Argument, Petitioner argues that because of its attempt in 1936 to exercise the bondholders' option to receive guilders, the bonds should be regarded as having never been payable in dollars.

On June 5, 1933, the date of the passage of the Joint Resolution, no option had been exercised to receive guilders. The bonds were then payable in money of the United States.[1] The Joint Resolution dealt with all contracts so payable from its effective date and attached certain consequences. One such consequence was that such a contract was thereafter payable, dollar for dollar, in United States legal tender. This command of public policy could not thereafter be defeated by an election to take guilders instead of dollars. Upon the date of the statute the bonds fitted the statutory definition.

Under Point II of its Argument, page 23 of its brief, the Petitioner is wrong in stating that it was solely the fact that the amounts of the foreign moneys mentioned in the bonds were then equivalent to $1,000 of United States gold coin that prompted the Court below to conclude that the foreign moneys mentioned in the foreign

[1] This would seem to be true whether the bonds were regarded as primarily payable in United States money, *i. e.*, so payable if no election is made, as found below (R. 141), or if the option to receive dollars or guilders be regarded as of equal rank. In either case, the bonds may be paid in money of the United States, are capable of being so paid, and thus are payable therein within the applicable definitions of the word "payable" as set forth in the opinion of the Court below.

money options were intended as the equivalent of $1,000 of United States gold coin of the standard of weight and fineness as it existed January 1, 1912. This fact was of importance in reaching that conclusion, but there were also other significant facts. Some of these facts were: (a) the express statement in the mortgage that the foreign moneys mentioned in the options should be the equivalent of $1,000 in United States gold coin of the standard of weight and fineness existing on January 1, 1912 (R. 39, and *supra*, p. 3); (b) the lack of any relationship of the transaction to any foreign money or of any suggestion why the holders of the bonds should desire foreign money except to convert into United States money; (c) the nationality of the debtor, and of the purchasers of the bonds; (d) the fact that bonds were to be issued under the mortgage indenture in a principal amount as expressed in United States money equal to expenditures in such money (R. 133).

On pages 24 and 25 of its brief, the Petitioner places in juxtaposition quotations from the decision below and from Judge LEARNED HAND'S opinion in the *Anglo-Continental Treuhand* case as if they were opposed. But whatever may be said of the cases as a whole there is no contradiction in the quotations. Judge STONE is pointing out that the foreign moneys were fixed in value as tantamount to the United States gold coin called for by the bonds. Judge LEARNED HAND is pointing out that the guilders were not gold; this may be assumed, but it does not follow that gold coin was not the measure for the number of guilders specified. Nor does the Petitioner demonstrate an error in Judge STONE'S reasoning by pointing out that there has been a fluctuation in the value of the foreign moneys in relationship to the dollar, during the period which embraced the World War and the recent depression. The facts remain that parties, not genuinely desiring guilders, pounds, marks or French francs as such, secured options to receive specified amounts thereof as an alternate to receiving gold coin, and that the amounts which they could

ionally receive of such foreign moneys were fixed as
amount to the value of the gold coin promised. The
ivalence was intended, and the contract is not to be
ed because it is partly frustrated by conditions. So
as the Petitioner's claim in respect to Dutch guilders
oncerned, it may in truth preserve to the Petitioner ap-
ximately the equivalent in value of the 1912 United
es gold coin because the guilder remained at its pre-war
until September 27, 1936 (R. 140).

he Court below did not say that the bond contracts were
red into in an attempt to evade the Joint Resolution,
h was not passed until many years later. It did say
the exercise of the foreign money options, if allowed,
ld present the same evil as the enforcement of the gold
se. This is indubitably true. Petitioner attempts to
le this conclusion, under Point III of its Argument,
he doubtful assertion, on page 28 of its brief, that
shortage of gold in 1933 created the necessity to
the Joint Resolution into being, and thus attempts to
v the inference that only contracts which call for the
nent of gold coin should come within the reach of the
t Resolution, but, as is clear from the Joint Resolu-
and as has been pointed out by members of this
t, the Joint Resolution condemned alike gold coin con-
s and gold value contracts, and contracts which in-
ed the amount of currency to be paid by a debtor to a
tor because of the devaluation of the United States
dollar were hit by the Joint Resolution as well as
acts which called for gold specie.

e of the purposes of the Joint Resolution was to make
argeable in United States legal tender, dollar for
r, an agreement by a debtor, who had borrowed
d States gold coin, to repay that amount of gold
or an increased amount of United States currency
ensating for a devaluation of the United States mone-
unit. It follows that there is little reason not to
the Joint Resolution to an agreement by one who
borrowed United States gold coin, to repay that

amount of gold coin, or to pay an increased value in another medium (which must be translated into United States currency) in order to compensate for the devaluation of the United States dollar. Judge STONE stated this very forcibly in his opinion below (R. 253), as follows:

> "Thus by running around an international stump—passing through Holland en route—the holder of every bond and coupon enriches himself substantially at the expense of the debtor and of other creditors. Here, the same result (with further saving of exchange charges) is reached merely through a formal demand in Holland for payment (known to be futile) and by a simple mathematical calculation. Also, this in a situation where no payment is possible but where the above advantage will increase the indebtedness of the debtor and, therethrough, the participation of these holders in the property reorganization at the expense of every other person financially interested in that property."

Certainly we cannot believe that there is any constitutional objection, as argued under Point IV of Petitioner's Argument, to the application of the Joint Resolution to either type of contract. If there is any constitutional question we believe that it would arise if an interpretation is given the Joint Resolution which arbitrarily discriminates between different types of contracts accomplishing the same end, to-wit, compensation in a United States money contract, at the expense of the debtor, for monetary devaluation. In this case the Respondent Southern Pacific Company, holding bonds of the St. Louis Southwestern Railway Company containing the gold clause, has urged throughout that an arbitrary and unreasonable classification would exist if the Joint Resolution be so construed that the holders of the St. Louis Southwestern Railway Company bonds involved in this case should be compensated for the depreciation of the United States dollar at the expense of other creditors who had also bargained for protection against such depreciation through the gold clause.

CONCLUSION.

It is submitted that the petition should be denied.

Dated: October 17, 1938.

Respectfully submitted,

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